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Supreme Court of the United States

OCTOBER TERM, 1969

No. 432

A. ROBERT RAY,

Petitioner,

versus

CITY OF PRICHARD, ALABAMA,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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OPINIONS BELOW.

The opinion of the Court of Appeals of Alabama, First Division, is reported at 222 So.2d 345, and the opinion and judgment of that Court as set forth in Appendix 1 of the petition. The order of the Supreme Court of Alabama denying certiorari is reported at 222 So.2d 346, and is also set forth in Appendix 1 of the petition.

JURISDICTION.

This Court should decline to exercise jurisdiction because the petitioner failed to observe reasonable State procedural requirements in seeking review of his conviction by the Court of Appeals of Alabama.

QUESTION PRESENTED.

Whether the petitioner is entitled to the issuance of a writ of certiorari to the Court of Appeals of Alabama when the petitioner, through his own neglect, fails to follow reasonable procedural requirements which result in the affirmance of the conviction in the court of first instance.

RULES AND STATUTES INVOLVED.

The rule or statute involved is Rule 23 (1) (f) Revised Rules of the Supreme Court of the United States, effective July 1, 1954. It is printed in the Appendix, *infra*, p. 9.

STATEMENT OF THE CASE.

The statement of the case of the petitioner as set out in its petition is substantially correct.

ARGUMENT.

The question presented in the case at bar is sufficiently narrow that no amount of strained semantics can convert it into one warranting review by this court on certiorari.

It has been the settled law of Alabama that "prosecutions for violations of municipal ordinances are statutory and quasi criminal in nature." The portion of the preceding statement enclosed in quotation marks is taken from *Parks v. City of Montgomery*, 38 Ala. App. 681, 92 So.2d 683, which was decided in 1957. There appears in the report of the case 15 cited cases in support of this proposition

of law, the earliest of which is *Perry v. State*, 1 Ala. App. 253, 55 So. 1035, which was decided in 1911.

The *Parks* case, *supra*, also contains the following:

> Such appeals are not governed by the statute regulating criminal appeals which dispenses of assignments of error, . . .

There is cited in support of this statement 14 cases, some of which are cited in support of the first proposition mentioned above, also commencing with *Perry v. State, supra.*

The *Parks* case, *supra*, continues with the following proposition:

> One of our fundamental rules relating to civil appeals is that there must be assignments of error, otherwise there is nothing before the court for review. Davis v. City of Guntersville, 27 Ala. App. 208, 169 So. 222; Wetzel v. Hobbs, 249 Ala. 434, 31 So.2d 639; Benich v. Stewart, 34 Ala. App. 61, 36 So.2d 599; Wrought Iron Range Co. v. Pollard, 37 Ala. App. 341; 67 So.2d 855; Tidwell v. Town of Town Creek, 264 Ala. 333, 87 So.2d 646.

The *Parks* case, *supra*, concludes with the following paragraph:

> Where no errors are assigned in appeals from convictions from violations of municipal ordinances, the judgment appealed from must be confirmed.

There is cited in support of this last paragraph 20 cases commencing again with *Perry v. State, supra.*

The proposition that appeals from a finding of guilt for the breach of a City ordinance is governed by the rules relating to civil appeals was reaffirmed in *Bokulich v. City of Demopolis*, 44 Ala. App. 543, 215 So.2d 608, decided in 1968.

It cannot be argued, by any stretch of the imagination, that these decisions have anything whatsoever to do with an attempt to circumvent violations of anyone's civil rights or constitutional guarantees. These are rules of law and of procedure which have been known, without questions, to be the Bench and Bar of the State of Alabama, since at least 1911 when the decision in the *Parks* case, *supra*, was first published.

It has long been the rule of this Court that if reasonable State procedural requirements are not observed, this court has declined to exercise jurisdiction both where the highest state court expressly refuses to decide the Federal question for this procedural reason, *Penn. R. Co. v. Ill. Brick Co.*, 297 U.S. 447, 462-3 (1935); *Erie R. Co. v. Purdy*, 185 U.S. 148 (1901); and where the highest state court is completely silent on the Federal question. *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 309 (1902). It should be noted that in failing to observe this reasonable State procedural requirement the rules of this court were violated in that the petition of the writ of certiorari does not comply with Rule 23(1) (f) which requires in part:

1. The petition for certiorari shall contain and the order here indicated—

. . . (f) if review of the judgment of the state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance *and in the appellate court*, at which, and the manner in which, the Federal questions sought to be reviewed were raised; *the method of raising them*.

(e.g., by pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; . . . as will show that the Federal question was timely and properly raised so as to give this court the jurisdiction to review the judgment on writ of certiorari. (Emphasis supplied.)

It thus appears that the rules of procedure of both this court and of the appellate court of the State of Alabama have been ignored.

In *Milk Wagon Driver's Union v. Meadowmoor Dairies*, 312 U.S. 287 (1940) which was a case involving the issuance of an injunction by the State of Illinois in a labor dispute this court held:

. . . B. But we do not have revisory power over state practice provided such practice is not used to evade constitutional guarantees.

It cannot with any degree of logic be contended that the state practice in the instant case was used to evade constitutional guarantees.

Perhaps the case which comes closest to declaring the reason that the petition for writ of certiorari should not be granted in the case at bar is *Parker v. Illinois*, 333 U.S. 571 (1948) where Mr. Justice Douglas speaking for the Court said:

> When Federal rights are involved, it is, of course, for this court finally to determine whether the failure to follow the procedure designed by a State for their protection constitutes a waiver of them. Davis v. O'Hara, 266 U.S. 314, 69 L.ed. 303, 45 S.Ct. 204; Central U. Teleph. Co. v. Edwardsville (U.S.), supra. The court said in the Edwardsville case that when the waiver is founded on a failure to comply with the appellate practice of a state, the question turns on whether that practice gives litigants "a reasonable opportunity to have the issue as to the claimed right heard and determined" by the State court. 269 U.S. pp. 194, 195, 70 L.ed. 231, 46 S.Ct. 90. It was there held that the Illinois practice of requiring constitutional questions to be taken directly to the Illinois Supreme Court and of refusing to review them if review was first sought in the appellate court satisfies the requirement. We adhere to that decision. The channel through which the constitutional questions raised by the petitioner in his attack on the amended order, could have been taken all of the way to this court was not only clearly marked, it was also opened and unobstructed.
>
> Petitioner appears here *pro se* but *at the critical stages of this litigation he was represented by counsel of record*. For the lawyer the choice was plain. Under these circumstances petitioner plainly had a reasonable opportunity to have his Federal questions passed upon by the State court. When petitioner acting through counsel decided to seek review in the appellate court he

made a choice which involves abandonment of the constitutional issues which he had raised in the proceedings. . . . (Emphasis supplied.)

The petitioner in the case at bar was represented at all "critical stages" of this litigation by counsel of his own choice who were members of the Bar of the State of Alabama, and knew or were presumed to know the rules of appellate procedure of the State of Alabama.

The case of *NAACP v. Alabama*, 357 U.S. 449 (June 30, 1958) is easily distinguishable from the case at bar. There is a rule of state pleading or procedure had been used unreasonably to avoid a decision relative to federal rights. In addition the ruling was inconsistent with earlier state court rulings. This situation does not exist in the case at bar. The rulings of the appellate courts of the State of Alabama in the case at bar are consistent with all of the rulings made on the point in issue since first brought to the Appellate Court's attention in 1911.

The petitioner through his own neglect failed to avail himself of the remedy supplied him by the State of Alabama to attack the judgment against him and it thus follows that if a remedy is available but the petitioner through his own negligence fails to avail himself of it he cannot complain that such failure denies him due process of law guaranteed by the Fourteenth Amendment. *Paterno v. Lyons*, 334 U.S. 314 (1948).

CONCLUSION.

It is evident that the State of Alabama provided a reasonable method for the petitioner to raise those constitutional questions which concerned the judgment rendered against him in the court of the first instance; that his failure to do so was a result of his own neglect and as a consequence of this the writ of certiorari should be denied and the judgment below affirmed.

Respectfully submitted,

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APPENDIX.

(From Supreme Court Practice—Rules and Statutes—23 (1) (f) pp. 548)

(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and in the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

Where the portions of the record relied upon under this subparagraph are voluminous, and the petitioner has not filed with his petition nine copies of the record as printed for the use of the court below, under the provisions of paragraph 4 of Rule 21, then those portions of the record shall be included in an appendix to the petition, which may, if more convenient, be separately presented.